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No. 03-855

Supreme Court, U.S.
FILED
JUN 2 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL, DALE ROOD, DICK LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN PATTERSON, and IVA ROGERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner, the City of Sherrill ("Sherrill"), submits this supplemental brief pursuant to Supreme Court Rule 15.8 to address intervening matter not available at the time of Petitioner's last filing – that is, the amicus brief served by the United States ("US Brief") on May 28, 2004. This Supplemental Brief corrects fundamental errors and omissions in that amicus brief.

1. The United States (US Brief at 2, 8) notes that the 1788 Treaty of Fort Schuyler was entered into by the State of New York without the approval of the federal government. However, no federal government approval of State treaties with Indian tribes was required in 1788. The constitution had not yet become effective and the United States government was operating under the Articles of Confederation. As such, the New York State 1788 Treaty of Fort Schuyler was plainly lawful. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1148 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

2. The United States asserts that the language recognizing and guaranteeing the Oneidas' lands under the 1794 Treaty of Canandaigua, 7 Stat. 44, was "virtually the same" as the language regarding the Senecas' lands. (US Brief at 8-9). That is incorrect. With respect to the Oneidas, article 2 of the 1794 Treaty of Canandaigua acknowledges the reservation established by the State of New York:

> The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them in the

> free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase. (A141; emphasis added).

On the other hand, as to the Senecas, the specific metes and bounds of the reservation set aside by the federal government are described in detail, and no prior State reservation is mentioned. (A142). Thus, the Oneida reservation is a State reservation and the Seneca reservation is a federal reservation.

3. The United States never explains the effect of the express permission to sell granted to the Oneidas and other tribes in the 1794 Treaty of Canandaigua, and the express right of the people of the United States to purchase: "said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." (A141, 142; emphasis added). The State of New York is among the people of the United States who had the express right to purchase under the 1794 Treaty of Canandaigua.

4. The United States asserts that Petitioner does not dispute that the sales of the parcels at issue in the early nineteenth century violated the Non-Intercourse Act, 25 U.S.C. § 177. (US Brief at 7, 15). That is wrong. Petitioner has always asserted that those sales were lawful because of the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua.

5. The United States asserts (US Brief at 17-18) that the land at issue is Indian country despite the fact that it was neither set aside nor superintended by the federal government. In doing so, the United States ignores this Court's holding in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527, 530 (1998) ("*Venetie*") that federal

set aside and federal superintendence is required for all three prongs of Indian country – reservations, allotments and dependent Indian communities.[1] Contrary to the United States' position, merely identifying land as a "reservation" does not supply the required analysis or proof.

The United States also ignores entirely the fact that, as previously explained, in the 1788 Treaty of Fort Schuyler, the New York Oneidas expressly ceded all of their territory to the State of New York, terminating all aboriginal title. New York then set aside a reservation of approximately 300,000 acres for the New York Oneidas' future use. The 1794 Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create or set aside a reservation for the Oneidas. (Petition at 15-17).

The United States also totally disregards this Court's requirement in *Venetie* of federal superintendence for Indian country status. Instead, the United States joins the Oneidas in the claim that federal superintendence is established simply because federal set aside is established, *i.e.*, because of the provisions in the 1794 Treaty of Canandaigua. (US Brief at 17-18 & n.5). *Venetie*, however, requires both federal set aside and federal superintendence. Treaty provisions, at most, address the issue of federal set aside, not superintendence. Superintendence requires that the federal government "actively controls the lands in question,

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[1] The United States explains that *Venetie* involved an Indian tribe's claim that certain land was a "dependent Indian community" under 18 U.S.C. § 1151(b) and did not specifically address a claim of reservation status pursuant to 18 U.S.C. § 1151(a) (US Brief at 17-18). That is true as to the land at issue in *Venetie*, but this Court made clear in *Venetie* that the determination of whether land is Indian country is the same, whether such land is claimed to be a reservation, a dependent Indian community or an allotment. *Venetie*, 522 U.S. at 527.

effectively acting as guardian for the Indians." *Venetie*, 522 U.S. at 533. No such superintendence over the land at issue ever occurred.

6. The United States suggests that, when the Oneidas re-acquired the lands at issue, the lands became subject to the restrictions of the Non-Intercourse Act, 25 U.S.C. § 177. (US Brief at 6, 7). On the contrary, there is no suggestion in the record that the Oneidas have treated their re-acquired properties in such a fashion. Rather, the Oneidas have done with the properties as they wish, ignoring state and federal regulation at whim.

7. The United States also fails to address the 1838 Treaty of Buffalo Creek, 7 Stat. 550, in light of this Court's decision in *New York Indians v. U.S.*, 170 U.S. 1, 19 (1898). In *New York Indians v. U.S.*, 170 U.S. 1 (1898), this Court held that, upon execution of the 1838 Treaty of Buffalo Creek, the Oneidas were required to abandon all eastern lands (including lands in New York) and move to Kansas (west of the Mississippi River). *See id.* at 19; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. U.S.*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases").

The United States joins the Oneidas in arguing that the 1838 Treaty of Buffalo Creek was limited to Wisconsin lands, and had nothing to do with lands in New York. (US Brief at 13-14). That ignores the language of the Treaty and the *New York Indians* cases. As the United States concedes, (US Brief at 13), the agreement by the New York Oneidas and others to abandon **all** eastern lands – and not merely Wisconsin lands – was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Contrary to the United States' suggestion (US Brief at 13), however, the word "probably"

did not indicate that the 1838 Treaty of Buffalo Creek might not expressly contain that agreement by the Oneidas and others to abandon all eastern lands; rather, the word "probably" merely indicated some possibility that another inducement was the main inducement.

This Court in *New York Indians* expressed no doubt that the New York Oneidas agreed to abandon all eastern lands, including New York, in the 1838 Treaty of Buffalo Creek. Further, the judgment in *New York Indians* was not limited to lands in Wisconsin; and the New York, Wisconsin and Thames Oneidas all shared in a nearly $2 million recovery. *See id.* at 19; *United States v. New York Indians*, 173 U.S. at 468-69; *New York Indians v. U.S.*, 40 Ct. Cl. at 457-61; *In re Appeal of New York Indians*, 41 Ct. Cl. at 468-72.

8. The United States also ignores serious factual disputes – established without any discovery – as to whether the Oneidas maintained a continuous tribal existence from the time the reservation was allegedly established to when the lands at issue were repurchased. (US Brief at 15-17).

The Second Circuit concluded that a federally recognized tribe need not have maintained continuous tribal existence in order to sustain a claim to reservation land. That is not the law. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*") ("To establish a *prima facie* case based on a violation of the [Non-Intercourse] Act, a plaintiff must show that . . . the trust relationship between the United States and the tribe has not been terminated or abandoned"); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482 (1st Cir. 1987). Stated differently, if at any point tribal status ceases, Indian country status ceases.

The United States suggests that federal recognition of the Oneidas as a tribe is entitled to substantial, if not dispositive, weight. (US Brief at 15-16). But the record is barren as to the basis for, or the effect of, that determination. Moreover, it does not matter that the tribe is currently a federally recognized tribe: "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Non-Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still [seek] an ultimate judicial determination of its claim under the Non-Intercourse Act." *Id.* at 58.

The United States also argues that the record below – without even the benefit of discovery – established merely that there had been fluctuations of tribal activity. (US Brief at 16). That usurps the factfinder's role after discovery and trial. There was substantial evidence presented below that the New York Oneidas ceased to exist as a tribe for decades in the late nineteenth and early twentieth centuries. (Petition at 27-29). That evidence created a triable issue of fact as to termination of tribal status and intent to abandon tribal status.

9. Finally, the United States asserts that this case is not of sufficient importance to merit this Court's exercise of certiorari jurisdiction because it only involves a small portion of the 250,000 acres bought by the State of New York from the Oneidas. (US Brief at 19-20). That ignores the significance of the Second Circuit's decision on the ongoing Oneida, Seneca and Cayuga litigations in the Second Circuit, and on the tax base of the myriad municipalities within the vast land claim areas.

The United States concedes that it has been litigating side-by-side with the Oneidas, Senecas and Cayugas in the

Second Circuit for decades. (US Brief at 19-20). The United States' partisan views aside, this case presents clear and important issues of Indian law that are ripe for determination.

CONCLUSION

For all of the foregoing reasons and for those set forth previously, the Petition should be granted.

June 2, 2004

Respectfully submitted,

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